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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

ORIGINAL

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

REPLY COMMENTS OF THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE AND THE CONSUMER FEDERATION OF AMERICA

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Dated: February 16, 1993

No. of Copies rec'd 0+11
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SUMMARY

The common theme echoed throughout this proceeding by virtually all would-be competitors to cable is that the Commission's Notice is inadequate to implement the program access requirements of the Cable Act. The cable television industry, on the other hand, was wildly enthusiastic in response to the Notice. Having "lost" the battle against program access on Capitol Hill, the cable industry is now apparently determined to win the war at the FCC.

The ability of multichannel video programming distributors ("MVPDs") to compete effectively with cable has been blocked by a lack of access to popular programming at fair prices on reasonable terms and conditions. Congress directed the FCC to correct this problem by implementing rules that -- at a minimum -- prohibit this type of discrimination. The restrictions proposed by the cable industry would guarantee that no complaints of discrimination ever would be prosecuted successfully at the Commission.

The Commission cannot impose on distributors detailed, expensive antitrust-type requirements regarding the nebulous concept of economic "harm" to "subscribers" at the "retail level" in the "same geographic area" as a vertically integrated programmer operates a cable system. Discrimination

is per se harmful and violative of the statute. No additional "harm" need be shown. Nor can the Commission lawfully "grandfather" all non-conforming, existing contracts. Congress never intended to preserve indefinitely the very contracts that caused Congress to adopt corrective legislation in the first instance. Rather, Congress specifically considered the matter of "grandfathering" and preserved only a very narrow class of existing contracts. All other contracts were not grandfathered.

Congress crafted new program access laws to protect all MVPDs from discrimination. Different types of distributors need not demonstrate that they provide "like services" in order to receive protection under the law.

The Commission must require all programmers to file General Rate Structures ("GRS") to provide a cable baseline for analyzing discrimination complaints. The GRS must specify particular prices, terms and conditions offered to the cable industry, including volume discounts, packaging variations and other legitimate offerings of service. Any MVPD would establish a prima facie case of discrimination if the prices, terms and conditions offered to the MVPD were different in any respect from the GRS on file with the Commission.

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REPLY COMMENTS
OF THE
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE
AND THE
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The National Rural Telecommunications Cooperative ("NRTC") and the Consumer Federation of America ("CFA") hereby submit these Reply Comments, pursuant to Section 1.415 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission"), in response to the Comments submitted in connection with the Commission's Notice of Proposed Rule Making ("NPRM" or "Notice"), released in the above-captioned proceeding on December 24, 1992.1/

1/ Notice of Proposed Rule Making, 58 Fed. Reg. 328 (January 5, 1993).

I. **BACKGROUND**

1. In its Notice, the Commission proposed to implement Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act"), which was enacted by Congress to promote the development of competition and diversity in video programming distribution. In their Comments, NRTC and CFA expressed extreme disappointment and frustration with the proposals contained in the Commission's Notice. Rather than implementing the new statutory ban against discrimination, as directed by Congress, the Commission's Notice appeared to propose as many "loopholes" as is possible for the cable industry to justify discrimination against other distributors. NRTC/CFA argued that the Commission's Notice largely ignored clear statutory requirements designed to promote new, competing delivery technologies and to increase the availability of programming to rural Americans. It failed even to acknowledge the seriousness of the discrimination problem identified by Congress.

2. NRTC/CFA took exception to various proposals in the Notice which place unnecessary roadblocks and hurdles before distributors challenging a cable programmer's

discriminatory practices. In particular, NRTC/CFA argued that the Commission's proposal to impose a "threshold requirement" of demonstrable "harm" before discrimination would become actionable was grossly inconsistent with statutory language and Congressional intent. Similarly, the Commission's proposal to "grandfather" all existing, non-conforming contracts would defeat the very purpose of the strong program access provisions adopted by Congress.

II. OVERVIEW OF COMMENTS

3. NRTC/CFA urged the Commission to re-direct its efforts along the lines established by Congress and to adopt rules which, at a minimum, firmly and clearly prohibit discrimination. The Commission should implement the statute, as directed by Congress. Fair, inexpensive and workable enforcement procedures must be established.

A. MVPD and Other Comments Support Strong Program Access Rules

4. NRTC/CFA's sentiments were shared by virtually <u>all</u> Multichannel Video Programming Distributors ("MVPDs") submitting Comments in this proceeding. The collective opposition to the <u>Notice</u> by MVPDs -- parties intended by

Congress to be protected from discrimination -- was consistent and overwhelming.

5. The **Wireless Cable Association ("WCA")** argued that "with the NPRM the Commission seems so preoccupied with resolving every real or imagined issue concerning Section 19 that it has lost sight of Congress' fundamental goal ...."2/ **WCA** argued that the Commission cannot lawfully require an independent showing of "harm." **WCA** was "flabbergasted" with the proposed grandfathering of existing contracts.3/ Other wireless cable operators (e.g., **Madison Communications, the Coalition of Concerned Wireless Cable Operators)** expressed similar concerns.

6. The National Private Cable Association, Maxtel Associates Limited Partnership, MSE Cable Systems, and Pacific Cablevision **("NPCA")**, representing the SMATV industry, noted that in its Notice the Commission seemed "dubious about the wisdom of Congress' judgement" in enacting the program access provisions of the Cable Act.4/ **NPCA** argued that the Commission appeared overly interested

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2/ WCA Comments at p. 3.

3/ WCA Comments at p. 28.

4/ NPCA Comments at p. 12.

in conserving agency resources and notably <u>un</u>interested in correcting the discrimination problem. **NPCA** argued that "the Commission has given far too much weight to the traditional excuses advanced by the vertically integrated cable interests to justify discriminatory and exclusive agreements."5/

7. **Liberty Cable Company**, a SMATV operator competing with Time Warner in New York City, provided detailed "real world" examples of discrimination. Liberty argued that "harm" need not be shown under the statute, and that any discrimination is presumptively illegal.

8. **Consumer Satellite Systems ("CSS")** indicated that it is one of the largest wholesale distributors of Home Satellite Dish (HSD) television equipment and the largest independent packager of satellite television programming in the country. It still experiences difficulties in gaining access to satellite cable programming on fair and equitable terms. **CSS** pays twice as much as a wireless cable operator and four times the amount that an SMATV packager pays. In **CSS**' view, "the <u>NPRM</u> seems to over inflate the need for

5/ NPCA Comments at p. 21.

showing that access has been denied before relief can be granted."[6/]

9. Three Direct Broadcast Satellite ("DBS") licensees submitted Comments. **Advanced Communications Corporation ("ACC")** urged the Commission to mandate a blanket prohibition on price differences in the sale and delivery of programming to MVPDs. **DirecTV, Inc.** pointed out that Congress gave the FCC a broad and unequivocal mandate to implement the program access provisions.[7/] **United States Satellite Broadcasting Company ("USSB")** contended that many of the questions presented by the Commission in the Notice are answered by the Cable Act itself.

10. Telephone companies expressed the same type of concerns regarding the proposals contained in the Notice. **Bellsouth Telecommunications** argued that in the Notice, "the very evils the statute is designed to prevent are out-weighed by Commission concerns over ease of regulatory

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6/ CSS Comments at p. 14.

7/ In its Comments, NRTC/CFA described its Agreement with Hughes Communications Galaxy, Inc./DirecTV to provide high-powered DBS services to rural America. The **Rochester Telephone Corporation** noted that it is intending to market DBS service through a subsidiary.

administration."[8/] **NYNEX Telephone Companies** argued that the Commission incorrectly broadened the showings required to prosecute a complaint of discrimination under the Cable Act. **US WEST Communications** disagreed with the Commission's proposed analysis of discrimination, and argued instead that discrimination is a per se violation of the Cable Act. **Bell Atlantic** and **The Pacific Companies** supported unfettered access to programming.

11. The **National Telephone Cooperative Association ("NTCA")**, an association of approximately 500 small and rural local exchange carriers, urged the Commission to abide by the statute and legislative intent and to refrain from adopting rules that would allow violators to escape through "loopholes." **NTCA** specifically cited NRTC's experiences of paying higher prices for services, and expressed concern that these practices be brought to an end.

12. The **United States Telephone Association ("USTA")** argued that the Commission's reading of the Cable Act is "unusually restrained," and that the Commission is not at liberty to give specific Congressional objectives less than

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8/ Bellsouth Telecommunications Comments at p. 10.

"full and literal implementation."9/ It argued that the Commission should not include a test of "harm" to competition. Rather, "the Commission should adhere to the statutory language."10/ **USTA** suggested that in the Notice the Commission is attempting an "unlawful administrative nullification of Congress' intent and the governing law."11/

13. The Comments of the **American Public Power Association ("APPA")**, a national service organization representing the interests of more than 1,750 locally owned electric utility systems, the **CableAmerica Corporation ("CableAmerica")**, an "over builder" of cable systems in several markets, and the **Coalition of Small System Operators ("Operators")** also reflected the same concerns. **APPA** argued that the Commission has misinterpreted the Cable Act, and that a "harm" showing is not necessary in order to obtain relief from discrimination. **CableAmerica** argued that "the Notice does not always remain faithful to the basic enforcement structure established by the Cable Act," and that it introduces unauthorized and unwarranted complexities

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9/ USTA Comments at pp. 2-4.

10/ USTA Comments at p. 3, n. 2.

11/ USTA Comments at p. 4.

into the Cable Act's program access and anti-discrimination provisions.[12/] **CableAmerica** claimed that the Commission is attempting to "transform this clear statutory structure into a murky and ill-defined analytic exercise."[13/] The **Operators** argued that neither the Cable Act nor its legislative history suggests that Congress intended to require a showing of "harm" in order to prove that a vertically integrated cable operator is engaging in unfair competition.

14. The **Community Antenna Television Association ("CATA")** recognized that discrimination and anti-competitive behavior can result even in discriminatory prices, terms and conditions being imposed on small cable operators and other MVPDs lacking market power.

15. The **Attorneys General of Texas, Maryland, Ohio and Pennsylvania ("States")** provided particularly illuminating Comments. The **States** are members of the Cable Television Investigative Group specially appointed by the National Association of Attorneys General Multi-State Anti-Trust Task Force. They have been investigating this problem for years.

12/ CableAmerica Comments at p. 10.

13/ CableAmerica Comments at p. 11.

The **States** believe that the program access sections of the Cable Act should be read broadly and should favor victimized distributors and competitors, rather than vertically-integrated programmers. The **States** urged the Commission to ban discrimination across-the-board. They supported a pricing structure, applicable uniformly to all delivery systems, that reflects actual costs incurred by the programmer in providing programming.

B. Cable and Other Comments Oppose Program Access on Fair Terms and Conditions.

16. The cable television industry, on the other hand, submitted wildly enthusiastic Comments in response to the proposals contained in the Commission's Notice. Having "lost" the battle on Capitol Hill, the cable industry is now apparently determined to win the war at the FCC. Rarely have so many fought so hard to preserve a right to discriminate against would-be competitors.

17. Section 628(b), on its face, prohibits certain "unfair methods of competition or unfair or deceptive acts or practices" by three types of entities: cable operators; satellite cable programming vendors in which a cable operator has an attributable interest; and satellite

broadcast programming vendors. See Section 628(b). The cable industry and others argued in their Comments, however, that the prohibitions of Section 628(b) do not apply to:

- non-vertically integrated cable operators; (Cablevision Comments at p. 8)
- non-vertically integrated satellite broadcast programming vendors; (Primetime 24 Comments at p.4)
- relationships between cable operators and non-vertically integrated programmers; (NCTA Comments at p. 11)
- superstation programmers with fewer than 300,000 cable subscribers; (Superstar Comments at p. 34)
- superstations and other programmers whose "total number of affiliated cable subscribers is less than the number of subscribers served by competing technologies;" and (Superstar Comments at p. 34)
- any entities with cable system holdings representing less than five percent of the total subscribership of their affiliated networks. (Viacom Comments at pp. 3-4)

18. Next, the cable industry argued that even if a distributor is able to identify a party or an agreement that is subject to the provisions of Section 628(b), many of the most offensive existing cable industry practices should be exempt from coverage. For example, according to the cable industry, the following conduct should be presumed "lawful" under the legislation even though no such presumptions were recognized by Congress:

- "historical and widespread deal patterns and practices;" (Cablevision Comments at p. 7)
- conduct that is common to both integrated and non-vertically integrated programmers; (Discovery Comments at p. 13)
- higher prices that are lower than the perceived market value of programming based on objective third-party studies; (Discovery Comments at pp. 24-25)
- price differentials that lack prohibited "purpose or intent" by the programming vendor; (E! Entertainment Television Comments at pp. 7-8)
- conduct that does not adversely affect a multichannel distributor to the competitive benefit of a programmer's commonly owned cable system; (NCTA Comments at p. 11)
- differential prices, terms, and conditions established by a vendor; (Rainbow Comments at p. 6)
- any justification that the Commission has permitted in Section 202(a) proceedings, as well as justifications permitted by the Robinson-Patman Act and precedents; and (Discovery Comments at p. 25)
- variances in terms and conditions of carriage within a zone of **30%**. (Viacom Comments at p. 19)

19. Once an aggrieved MVPD has overcome these proposed obstacles, the cable industry argued that the following additional "threshold criteria" must be established before enforcement proceedings can be initiated by an aggrieved distributor. None of these requirements, of course, are specified in the statute.

- that non-vertically integrated vendors do not utilize comparable price differentials; (Rainbow Comments at p. 18, n. 42)

- that the distributor is not subject to any of the available differentials listed in Section 628(c)(2)(B)(i)-(iv); (Superstar Comments at 48)

- that with respect to a program licensed within a restricted geographic area, the distributor has requested from the program vendor, in writing, distribution rights in specified geographic areas; (Group W Comments at p. 10)

- that (1) the distributor competes for subscribers, both functionally and geographically, with a rival distributor that obtains programming at more favorable prices, terms or conditions; (2) the disparity in prices, terms or conditions is reflected in the favored distributor's retail pricing; and (3) because of this disparity, the complainant cannot effectively compete with the favored distributor in selling satellite programming services to consumers; (Liberty Media Comments at pp. 5-6)

- that in actions against a satellite broadcast programmer, substantial barriers to entry preclude the distributor from uplinking broadcast programming; (Liberty Media Comments at p. 6, n. 2)

- that to support a finding of "undue influence," the programming vendor would not have engaged in the same distribution practice "but for" the influence of the affiliated cable operator; (Rainbow Comments at p. 12)

- that coercion must exist for "undue influence," and the programming vendor must be acting against its own best interests; (United Video Comments at p. 22)

- that an actual communication from a cable operator to a programming vendor took place in which the cable operator sought to persuade the programming vendor to change a sales-related decision; and that it must be a successful attempt; (Time Warner Comments at p. 16 and n. 14)

- that the distributor lost specific subscribers to another distributor of the challenged vertically integrated program service; (Viacom Comments at p. 21)
- that any disparity in prices, terms or conditions is reflected in the favored cable company's retail price to subscribers; and (IFE Comments at pp. 7-8)
- that the distributor "must have sought to resolve its dispute with the vertically integrated cable operator or programmer in good faith prior to submitting a complaint to the Commission." (Viacom Comments at p. 24)
- a complainant should be required to pass through to its customers any lower rate resulting from a favorable discrimination determination. (IFE Comments at pp. 7-8)

20. In short, the cable industry proposed roadblocks, not relief from discrimination. The majority of MVPDs are new entrants to this industry and are unable to incur the significant expense of detailed antitrust-type litigation. Collectively, the restrictions proposed by the cable industry would guarantee that no complaints ever would be prosecuted successfully at the Commission. Congress intended just the opposite result -- that the Commission would prescribe fair, workable program access rules that <u>at a minimum</u> prohibit discrimination.

III. REPLY COMMENTS

21. The common theme echoed throughout this proceeding by virtually all would-be competitors to cable is that their ability to compete effectively with cable has been blocked by a lack of access to popular programming at fair prices on reasonable terms and conditions. Congress directed the FCC to correct this problem by implementing rules that -- at a minimum -- prohibit this type of discrimination against MVPDs. The Commission cannot ignore this statutory mandate.

A. The Cable Act Does Not Permit the Commission to Require an Independent Showing of "Harm."

22. In its Notice, the Commission suggested that an aggrieved distributor must demonstrate as a "threshold requirement" some type of specific "harm" under Section 628(b) of the Cable Act before discrimination would become actionable under Section 628(c)(2)(B). Much of the frustration exhibited by various MVPDs in their Comments focused on the Commission's apparent intent to impose on distributors detailed, expensive antitrust-type requirements regarding the nebulous concept of economic "harm" to "subscribers" at the "retail level" in the "same geographic

area" as a vertically integrated programmer operates a cable system.

23. Although most MVPDs argued that Congress never intended such a requirement, and that the statute itself does not permit the Commission to require it, the cable industry embraced the "harm" concept and proposed numerous additional "threshold requirements" the Commission should impose upon distributors seeking relief under the program access provisions. All of them should be rejected.

24. The Commission's Notice and the cable industry's responses grossly misconstrue the intent of Congress in adopting program access legislation, as well as the specific statutory language enacted. Congress considered the program access problem for years and developed an extensive record of the many ways in which the cable industry has used its monopoly power to deprive competitors of programming on fair terms and conditions.[14]

25. After extensive consideration of the problem, Congress adopted the sweeping "PROHIBITION" contained in Section 628(b) of the Cable Act. Section 628(b) references

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14/ See, e.g., WCA Comments at pp. 4-19; NRTC/CFA Comments at pp. 2-10.

certain unfair methods of competition or deceptive acts or practices. In Section 628(c)(1), Congress directed the FCC to prescribe regulations to specify "particular conduct" that is prohibited by the provisions of Section 628(b). In Section 628(c)(2), Congress expressly articulated the "MINIMUM CONTENTS OF (the FCC's) REGULATIONS," including very specific prohibitions against discrimination in price, terms and conditions in the sale or delivery of programming by certain program vendors against other MVPDS. The only acceptable "justifications" for discrimination were statutorily defined and limited, as well.[15/]

26. Had Congress intended Section 628(b) to act as a "threshold" requirement for Section 628(c)(2), it never would have required the Commission to prescribe regulations which -- <u>at a minimum</u> -- prohibit discrimination and other conduct contained in Section 628(c)(2). The "harm" described in Section 628(b), therefore, was conclusively presumed by Congress to exist for conduct specified in Section 628(c)(2).

27. Congress never intended to preserve the <u>status quo</u> of the existing cable marketplace, or to hold sacrosanct

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<u>15</u>/ <u>See</u> Section 628(c)(2)(B)(i)-(iv).

"historic and widespread" cable industry practices. After five years of debate, Congress concluded that "harm" flows from the cable industry's long tradition of discrimination against competing technologies. Congress leveled the playing field by establishing per se violations of Section 628(b) in Section 628(c)(2). The Commission cannot lawfully question these Congressional findings or administratively nullify these Congressional directives.

B. Congress Did Not Intend the Commission to "Grandfather" All Existing, Non-Conforming Contracts.

28. In its Notice, the Commission tentatively concluded that regulations under Section 628 should not be applied "retroactively" to existing contracts. In their respective Comments, **NRTC/CFA**, **CableAmerica**, **NYNEX**, **WCA** and others urged the Commission to apply Section 628 to existing programming contracts.[16/] Like these other parties, **NRTC/CFA** noted that Congress was not silent on the issue of existing contracts, because it specifically addressed the matter in Section 628(h) by grandfathering only certain exclusive contracts in cabled areas.[17/] Had Congress

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16/ NRTC/CFA Comments at p. 32; CableAmerica Comments at p. 35; NYNEX Comments at p. 12; and, WCA Comments at p. 28.

17/ NRTC/CFA Comments at p. 32.

intended to grandfather <u>all</u> contracts, there would not have been a need to grandfather only a specific, limited type of existing contract.

29. Moreover, this statute is not "retroactive." It is to be applied on a "go-forward" basis, effective upon enactment. It does not "go back in time," for instance, to seek damages for what had once been a legal -- but is now an illegal -- practice.

30. Justice Story's traditional definition of a retroactive statute is one which "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." <u>Neild v. District of Columbia</u>, 110 F.2d 246, 254 (D.C. Cir. 1940), quoting <u>Society for Propagation of the Gospel v. Wheeler</u>, Fed. Cas. No. 13156, 2 Gall. 105, 139 (C.C.D.N.H. 1814). While the determination of "vested rights" may vary on a case by case basis, program access contracts do not create rights that are vested as contemplated under this definition. Section 628 in no way imposes any additional obligation or disability on a program vendor or cable operator for actions performed in the past.

31. Vested rights are traditionally associated with the bodies of law of property and entitlement. Fisch v. General Motors Corporation, 169 F.2d 266 (6th Cir. 1948), cert. denied, 335 U.S. 902 (1949). Program access contracts are ongoing and conditional. The contracts require continuous performance by both parties and are never really perfected until the contract is actually completed.

32. Section 628 does not impose obligations and disabilities on cable operators and program vendors that are "retroactive." These parties will not be "punished" for actions they performed prior to the enactment of the Cable Act and Section 628.

33. Many of the recent landmark cases on retroactivity give an indication of the types of obligations usually considered to be retroactive. See, e.g., Kaiser Aluminum & Chemical Corp. v. Bonjorno, 110 S.Ct. 1570 (1990) (effect of amendment of postjudgement interest statute on verdict that was still on appeal); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) (Secretary of Health and Human Services attempted to recoup money from Medicare service providers); and, Bradley v. School Board of Richmond, 416 U.S. 696 (1974) (effect of Education Amendments Act of 1972 on awarding of attorneys fees in desegregation cases). Unlike

the above cases, Section 628 does not involve a dispute over monetary awards which would relate back to a time before Section 628 existed. In fact, cable operators and program vendors who violate Section 628 will not be responsible for any of their discriminatory actions prior to the Cable Act's enactment date. While the contracts were made in the past, only the contracts AS THEY EXIST TODAY will be subject to Section 628's restrictions.

34. In Kaiser Aluminum and Chemical Corp. v. Benjamin, 110 S.Ct. 1570, 1577 (1990), the Supreme Court concluded that existing obligations may or may not be affected by new legislation, depending on whether the plain language of the statute evidences "clear Congressional intent." There is no evidence of congressional intent not to apply Section 628 to existing contracts. To the contrary, in looking at the language of Section 628, one concludes that if Congress had intended to apply Section 628 only to future contracts, it would not have felt the need to grandfather exclusive contracts in cabled areas under Section 628(h). The language of Section 628 requires immediate effect; otherwise, the specific grandfathering under Section 628(h) would have been moot and superfluous. Congressional intent, obviously, was not to grandfather other types of contracts.